ARUL ARULANENDHU

v.

MANICKAM ANGAMUTHU

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUMMONS NO. F22-476-1986]
28 FEBRUARY 1992

CONTRACT: *Sale and purchase of land - Restriction - Consent of State Authority - Land office rejected application to transfer land - Is it an illegal contract - Was there a valid contract.*

By an agreement dated 17 January 1973 the defendant agreed to sell to the plaintiff a piece of land and house at a price of RM4,900. The title to the said land had *inter alia* a restriction in that it cannot be transferred or leased without the consent of the State Authority. The defendant undertook to apply to the appropriate State Authority for its consent to transfer the said land to the plaintiff. The plaintiff paid the balance purchase price and was granted vacant possession of the said land. The Pejabat Tanah Gombak rejected the application of the defendant to transfer the said land to the plaintiff. The plaintiff's family have been at all material times and are still in occupation of the said land and house. The plaintiff paid all the necessary quit rent and assessment. The electricity and water was registered by plaintiff sometime in 1974.

Held:

[1] The agreement dated 17 January 1973 is not *void ab initio* as it was made subject to the defendant obtaining the approval in writing from the State Authority.

[2] The 1973 agreement was inchoate until either the approval of the State Authority was obtained after which the agreement would be complete and completely effective or when the approval was not forthcoming in which case the agreement must cease to have any effect. The agreement was in the nature of a conditional agreement subject to the happening of an event and if the event did not occur, the agreement could no longer be effective.

[3] Any attempt to vary the 1973 agreement is futile as the said agreement had ceased to exist. It is therefore idle for the plaintiff to pray for specific performance of the 1973 agreement or in the alternative for damages which he could only claim pursuant to the 1973 agreement.

[Plaintiff's claim allowed partially and defendant's counter claim dismissed.]

Cases referred to:

Wong Leong Sing & Anor. v. Wong Tan Ann [1981] 1 MLJ 99 ***(cit)***
Hee Cheng v. Krishnan [1955] MLJ 103 ***(cit)***
Chong Hoong & Anor. v. Wong Yuen Sang [1976] 1 MLJ 282 ***(cit)***
Chin Tai v. Seow Shiew & Anor. [1971] 1 MLJ 67 ***(foll)***
Denning v. Edward [1961] AC 245 ***(cit)***
Dalsukh v. Guarantee Life & Employment Insurance Co. [1974] AIR PC 182 ***(foll)***
Morris v. Baron & Co. [1918] AC 1 ***(foll)***
Harnath Kaur v. Inder Bahadur Singh [1922] AIR PC 403 ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 7(a), 33(b), 66
Rules of the High Court 1980, O. 39 r. 1

For the plaintiff - Atma Singh Veriah; M/s. Atma Singh Veriah & Co.
For the defendant - T. Selvarasan; M/s. T. Selvarasan & Co.

JUDGMENT

Lim Beng Choon J:

At the outset I should mention that the original plaintiff to this action was one Arul s/o Arulanendhu. However after he had instituted this action in December 1986 his health began to deteriorate and a request was made to this Court to take his evidence before the trial of this action. As the Court has power to do so under O. 39 r. 1 of the Rules of the High Court 1980, I allowed the application and on 5 December 1989 the testimony of Arul s/o Arulanendhu was duly recorded. A few months after the recording of his testimony or to be exact on 16 June 1990 Arul s/o Arulanendhu died and thereafter an application was made by one of his sons namely Inyasi Arul Javear @ Xavier to substitute him as plaintiff. To avoid confusion I shall in this judgment refer to the original plaintiff as the deceased plaintiff and Inyasi Arul Javier @ Xavier as the plaintiff.

In this action the plaintiff asked for specific performance of an agreement executed on 17 January 1973 between the deceased plaintiff and the defendant in respect of the sale and purchase of a piece of land held under QT(M) 1547 Lot 13 Mukim Batu, State of Selangor (the said land) together with a house built thereon known as 13, Jalan IC, Selayang Baru (the said house) at the purchase price of RM4900. He also asked for an order that the defendant or if he refused the Senior Assistant Registrar of the High Court (the SAR) on behalf of the defendant apply to the relevant State Authority for permission to transfer the said land to the plaintiff and thereafter a further order that the defendant or if he failed and/or refused to do so, the SAR would execute the appropriate memorandum of transfer of the said land in the name of the deceased plaintiff (now the estate of deceased plaintiff) in the event that permission has been obtained from the relevant State Authority. Alternatively, plaintiff claimed from the defendant:

(1) The return of the purchase price of RM4,900;

(2) The costs of renovation of the said house in the sum of RM17,321;

(3) Damages in the sum, of RM65,000 being the difference in the present value of the said land and house and the value of the same in December 1975.

The plaintiff also asked for interest at the rate of 8% per annum on the total amount from the date of judgment to the date of realisation and costs.

From the pleadings, the statement of agreed facts and the supplementary statement of agreed facts the following facts are not disputed:

(1) By an agreement made on or about 17 January 1973 (the 1973 agreement) between the defendant or the registered owner of the said land and house on the one part and the plaintiff as the purchaser on the other part, the defendant agreed to sell and the plaintiff agreed to purchase the said land and house at a purchase price of RM4,900;

(2) The title to the said land has *inter alia* a restriction which provides that the said land is not to be transferred or leased without the consent of the State Authority;

(3) Prior to or at the time of the sale of the said land, the defendant undertook to apply to the appropriate State Authority for its consent to transfer the said land to the deceased plaintiff;

(4) Pursuant to the aforesaid undertaking the deceased plaintiff paid the balance of the purchase price to the defendant;

(5) Upon receipt of the purchase price, the defendant delivered vacant possession of the said land and also the Qualified Title (M) 1547 to the plaintiff;

(6) The defendant by letter of 7 March 1973 through the then common solicitors of both parties, M/s. Mahindra & Hee applied to the Pemungut Hasil Tanah, Gombak for permission to transfer the said land to the deceased plaintiff;

(7) By letter dated 27 March 1973 he also personally applied to the Pemungut Hasil Tanah for permission to transfer the said land to the deceased plaintiff;

(8) The Pejabat Tanah Gombak by letter dated 6 December 1975 (Exhibit Bundle AB at p. 7) rejected the application of the defendant to transfer the said land to the deceased plaintiff;

(9) The deceased plaintiff and after his death the plaintiff and the members of the family have been at all material times and are still in occupation of the said land and house;

(10) The deceased plaintiff had been paying all the necessary quit rent and assessment;

(11) The restoration of the electricity and water supply to the said land was carried out by the deceased plaintiff some time in 1974.

From a careful reading of the evidence adduced at the trial, I have arrived at the following findings of fact bearing in mind the demeanour of each of the witnesses who testified for the plaintiff or the defendant. Firstly I have no doubt that the deceased plaintiff did spend some money in the clearing up of the said land and the restoration of water and electric supply to the said land as well as the renovation works to the said house. While the restoration of water and electric supply to the said land was carried out soon after the plaintiff went into occupation of the said land some time in July 1973, the renovation works to the said house had not commenced until the deceased plaintiff had received the letter from the Jabatan Tanah Gombak dated 6 December 1975 refusing to grant its approval to the defendant to transfer the said land to the plaintiff. In arriving at these conclusions I have not overlooked that the defendant in his evidence strongly denied that the plaintiff had ever carried out any restoration works to the land and the renovation works to the house as he claimed that he and his family were staying in the said house prior to 1972 and it was still in good condition. I do not think I can accept his bare denial particularly when he contradicted himself by saying later in his evidence that he who was working as a linesman with the Telecommunication Department was alloted government quarters since then. Furthermore he admitted that he sold the said house since he did not need the said house as he was given government quarters (see pp. 22 and 23 of the notes of proceedings). lt is also to be noted that the testimony of the deceased plaintiff (PW1) on this point has been corroborated by PW2, son of the deceased plaintiff, who said in his testimony that "I did assist my father in clearing up the compound and repairing the house. In any event the deceased plaintiff testified that (and this was corroborated by PW2) that he had engaged a contractor by the name of Kuppusamy to do the renovation works. Kuppusamy did not issue any receipt in respect of payments made to him as Kuppusamy did the renovation works "on a temporary basis" suggesting that Kuppusamy was a part time contractor and not a full time contractor. Unfortunately Kuppusamy died on 26 May 1987 and the deceased plaintiff could not call him to testify. However the plaintiff produced the death certificate of Kuppusamy Exhibit P1. Secondly I have equally no doubt that upon receipt of the letter of rejection from Pejabat Tanah Gombak on or about 6 December 1975 (the rejection letter) the deceased plaintiff duly

informed the defendant if not immediately at least soon after the deceased plaintiff had received the rejection letter on 6 December 1975 and I say so for these reasons. I cannot see any logic in the plaintiff concealing the rejection letter from the defendant particularly when, as alleged by the defendant, the plaintiff subsequently in December 1984 informed the defendant of the rejection letter when there is equally no logic for the deceased to inform the defendant in December 1984 if he had chosen not to inform him upon receipt of the rejection letter in December 1975. Furthermore the defendant in his evidence contradicted himself on this point when he in his examination in chief said that the deceased plaintiff only informed him of the rejection letter "3 years later because the plaintiff showed me the rejection letter". That would bring us to the year 1978 when the defendant claimed that he was first shown the rejection letter by the deceased plaintiff. It was only when the defendant was being cross-examined by Counsel for the plaintiff that he said that he was shown the rejection letter in December 1984.

Now Counsel for the defendant submitted that:

1. the whole transaction between the parties were *ab initio* unlawful and/or illegal; and
2. the parties may be restored to their original status or position in that the plaintiff give up possession of the house and land, upon the defendant returning the sum of RM4,900 to the plaintiff having regard to the fact that the plaintiff has been enjoying the occupation of the house and the defendant asking nothing from the plaintiff.

He then cited the two cases of *Wong Leong Sing & Anor. v. Wong Tan Ann* [1981] 1 MLJ 99 and *Hee Cheng v. Krishnan* [1955] MLJ 103 to support his contention.

Counsel for the plaintiff on the other hand submitted that "the parties are free to enter into an agreement for the sale of the said land but the same shall not be transferred or leased or tenanted, charged or disposed of without the prior consent of the State Authority." I take it that what Counsel meant was that the agreement for the sale of the said land is perfectly legal except that the parties are forbidden from trying to register the transfer of the said land from the owner to the purchaser except with the written consent of the State Authority. Counsel also cited the following cases to support his contention - *Chong Hoong & Anor v. Wong Yuen Sang* [1976] 1 MLJ p. 282 and *Chin Tai v. Seow Shiow & Anor.* [1971] 1 MLJ 67

On this issue I do not think it is necessary for me to review all the cases cited by both Counsel respectively and I need only to refer to the case of *Chin Tai v. Siow Shiow & Anor*. since that is a Federal Court Civil Appeal and it is binding on me. The facts in that case are similar to the facts in the present case and they may be briefly stated as follows: The appellant was the registered proprietor of rubber land in Jelebu. She had agreed to sell it to the respondents, the transfer of which was to be executed on the issue of title. The appellant refused to execute the transfer but applied for rescission of the agreement alleging fraudulent misrepresentation on the part of the respondents. The respondents counterclaimed for specific performance and damages. The learned trial Judge dismissed the appellant's claim for rescission but also dismissed the counterclaim on the ground that the agreement for sale was illegal as it was an attempt to evade the restriction which was expressed in these words:

> The land hereby alienated shall not be transferred charged or leased for a period of 10 years except with the express permission in writing of the Collector of Land Revenue, Jelebu.

In holding that the dismissal of the counterclaim to be erroneous, Ong CJ (who delivered the judgment of the Federal Court to which the other two Judges in the panel agreed) said at p. 69:

At the time when the agreement was made the Land Code (FMS Cap. 138) was in force and there is authority for saying that contracts of the type made in this case suffered from no taint of illegality: see *Malaya Borneo Building Society Ltd. v. Ramachandran*. Nor, so far as I am able to advise myself, does any such taint attach to the transaction under any of the provisions of the National Land Code 1965. Such being the case, the agreement of 13 April 1960 must be held valid. The only impediment to a transfer by way of specific performance as prayed in the counterclaim, is a requirement of the necessary permission. In the circumstances I think the application for such permission may be made by the first defendant, supported by a copy of this judgment as grounds of her application and by virtue of the agreement. In the event of permission being granted and the plaintiff failing after 14 days of notice received to execute a registrable transfer the Assistant Registrar of this Court is to do so in her place and call for surrender of the issue document of title by the plaintiff.

Should permission, however, be refused, the first defendant should be entitled alternatively to damages - being the amount of the first defendant's outlay expended in developing the land.

On the authority of the aforementioned *Chin Tai's* case I therefore hold that the 1973 agreement is not *void ab initio* as it was made subject to the defendant obtaining the approval in writing from the State Authority.

The matter, however, does not end here for the next question to be asked and answered is: As the State Authority had on 6 December 1975 rejected the defendant's application to transfer the said land to the plaintiff, would the 1973 Agreement remain effective in law? In both the two cases relied on by Counsel for the plaintiff it is to be noted that in both the cases no application had yet been made to the State Authority; hence the Court allowed the relief of specific performance of the relevant contract for sale, subject, however, to the plaintiff or defendant as the case may be, successful application to the State Authority for approval failing which the plaintiff would only be entitled to claim, damages. However that may be, some guidence can be found in the case of *Denning v. Edward* [1961] AC 245 where the Privy Council defined the scope of such restrictive condition at pp. 253-254:

Their Lordships are of the opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that **the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective**.

(Emphasis supplied).

A *fortiorari* when the consent is refused, the contract must cease to have any effect. This proposition is fortified by the judgment of the Privy Council in *Dalsukh v. Guarantee Life & Employment Insurance Co.* [1974] AIR PC 182. In that case R a member of a joint Hindu family on behalf of the family entered into a contract of sale of the family property with the plaintiff. One of the terms specified that the contract was subject to the Court's approval. R thereupon applied to the Court **praying** for approval of the contract but the application was rejected by the Court and the property was ultimately sold at an auction to D who had knowledge of the contract. Therefore the plaintiff filed a suit for specific performance of the contract for sale of the property. D, who contested the suit contended that the Court's approval having been refused the contract was void. In accepting the contention of D the Privy Council said at p. 186:

The conclusion that their Lordships have arrived at on question 1 may be thus summarised: The person to apply to the "attaching Court" for securing the approval of the Court was the vendor; on the construction of the contract, the provision for approval by the Court was not

> exclusively for the benefit of the purchaser, and therefore the purchaser cannot by his waiver get rid of the necessity for the Court's approval; the Court contemplated, was the Court having charge of the mortgage proceedings, as that Court alone could get rid of the order for public sale; application was made by the vendor to the proper Court and was refused; the contract then fell to the ground and had worked itself out. In their Lordships' opinion, the contract was a contingent contract and, as the contingency failed, there was no contract which could be made the basis for a decree for specific performance and the appellant's suit has to be dismissed.

It is to be noted that in the present case the deceased plaintiff in his evidence said (see pp. 4-5 of the notes of proceedings):

> I went and saw the defendant with this letter (rejection letter). I told him about the letter and since the land could not be transferred I asked him whether he would return my money in order that I can buy another piece of land. To that the defendant said that there was some mistake made by the District Office. **He also said that he knew someone in that office and he would see that man to rectify everything**. He told me not to worry. I still asked him for some 45 minutes how he could do that since **the latter said the land could not be transferred**. He kept telling me he could rectify the matter - there was a mistake by the Land Office. He asked (me) to wait while he would make another application.

Based on this piece of evidence, Counsel for the plaintiff submitted (if I have not misunderstood him) that the parties had, sometime in December 1975, entered into a fresh agreement with the defendant by which the defendant agreed to apply for permission to transfer. I do not see how it could be contended that the parties could have "entered into a fresh agreement," bearing in mind that the 1973 Agreement was inchoate until either the approval of the State Authority was obtained after which the Agreement would be "complete and completely effective or when the approval was not forthcoming" in which case the Agreement must cease to have any effect. The 1973 Agreement was in the nature of a conditional agreement subject to the happening of an event and if the event did not occur, the Agreement could no longer be effective - see s. 33(b) of the Contracts Act 1950

There is no evidence to support the contention that the defendant had offered to enter into a fresh agreement. Even had such an agreement been made there is no evidence to show that the plaintiff had indicated his absolute and unqualified acceptance of such an offer as required under s. 7(a) of the Contracts Act 1950. Again had such an offer be made there is no evidence to show that the defendant had by his suggestion to show that he would "see that someone" in the appropriate Land Office "to rectify everything" had intended to enter into a fresh legal contract. Indeed having regard to the common course of the conduct of the defendant in relation to the facts of the present case it is incredible that the defendant would agreed to enter into a new contract based on the same terms and conditions as set in the 1973 Agreement bearing in mind that the value of the said land and house would most probably be worth more than what they were worth in 1973. The most that can be said in favour of the plaintiff is that as the defendant was not in a financial position to refund the sum of RM4,900 being the purchase price of the said land and house at the time when the plaintiff brought to his attention the rejection letter, he tried to delay matter and took no step to get back his land and house. The conduct of the defendant though highly distasteful cannot to my mind be construed as a proposal to enter into a new contract as suggested whereby the old 1973 Agreement is abrogated. A mere representation to rectify matter with the appropriate Land Office cannot certainly by itself be sufficient to create a new contract

to replace the 1973 Agreement. At the most one could say is that it was an attempt to vary the 1973 Agreement. Lord Dunedin in *Morris v. Baron & Co.* [1918] AC 1 explained the difference between variation and rescission in his speech at pp. 25-26

> The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

In the present case any attempt to vary the 1973 Agreement is futile as the said agreement had ceased to exist. It is therefore idle for the plaintiff to pray for specific performance of the 1973 Agreement or in the alternative for damages which he could only claim pursuant to the 1973 Agreement. For these reasons, the claims of the plaintiff as set out in paras. 18(a), (b), (c) and (f) of his statement of claim namely his claims for specific relief and the consequential remedies as well as his claim, for general damages are dismissed.

As to the plaintiff's claim for special damages I am only prepared to compensate him for the moneys expended by him in installing electricity supply and laying of pipes which works were carried out prior to the date in which the plaintiff received the rejection letter. His claim for the moneys expended by him in carrying out renovation works to the said house comprising of raising the floor, building the lower part of the said house with brick and building of 5 new rooms is also allowed under s. 66 of the Contracts Act 1950 - see *Harnath Kaur v. Inder Bahadur Singh* AIR [1922] PC 403. Finally the plaintiff is allowed a refund of the purchase price of RM4,900. The above mentioned awards allowed by me can be summarised as follows:

1. Refund of the purchase price of	RM 4,900
2. Installation of electricity and lay in of pipe (round figure)	RM 1,100
3. Renovation wors of raising the floor, building of lower part of the premises with brick and building of 5 new rooms (round figure)	RM 6,200
	RM12,200

The aforesaid total of RMl2,200 will carry interest at the rate of 8% per annum from 7 December 1975 to date of judgment and thereafter at the same rate until settlement.

As to the defendant's counter claim for the sum of RM40,000 which he alleged to be the amount due as rental from 1 January 1976 until 28 February 1987, the counter claim is dismissed as the defendant has failed to lead any evidence to support his claim.

Finally the plaintiff is directed to return the title deed of the said land to the defendant and the plaintiff and all persons claiming through and under the deceased plaintiff to quit and deliver vacant possession of the said land and house to the defendant within three months from the date of the judgment.

As to the question of costs, I think the proper order is that each party to bear his own costs since the defendant notwithstanding his distasteful conduct has benefited immensely.

Also found at [1992] 3 CLJ 1415